

11-01-04
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Appl. No. 10/602,495
Response dated October 29, 2004
Reply to Office Action of 10/1/2004



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 10/602,495
Applicant : Darell James Shelton
Filed : June 23, 2003
TC/A.U. : 3751
Examiner : Huynh, Khoa D
Confirmation No. : 2225

Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

RESPONSE TO OFFICE ACTION - RESTRICTION & TRAVERSE

Sir:

In response to the Office Action mailed on 10/01/2004, Applicant makes
the following elections:

Restriction Requirement

In response to the Examiner's requirement of restriction, Applicant elects group
II for examination within the instant application. Group II as outlined in the Office
Action dated 10/01/2004 includes claims 45-47.

Traverse

Applicant respectfully traverses the restriction of the instant applicant into groups
I and II and requests reconsideration of the restriction requirement in light of the
following remarks.

In the Office action dated 10/1/04, the Examiner stated in paragraphs I and II that:

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-44, drawn to an apparatus, classified in class 004, subclass 237.
- II. Claims 45-47, drawn to a method, classified in class 004, subclass 661.

The inventions are distinct, each from the other because of the following reasons:

2. Invention II and I are related as process/method and apparatus for its practice. The inventions are distinct if it can be shown that either:
(1) the process as claimed can be practiced by another materially different apparatus or by hand, or
(2) the apparatus as claimed can be used to practice another and materially different process. (MPEP § 806.25(e)). In this case the method as claimed can be practiced by another materially different apparatus such as an apparatus that does not require both a seat portion and a back portion.

Office Action, 10/1/04, page 2.

Respectfully, the Examiner has not made out a proper prima facie case for restricting the claims in the instant application. Specifically, to establish a prima facie case for restriction the Examiner needs to:

- (1) provide reasons why the inventions as claimed are distinct, and
- (2) explain why the distinct inventions must be restricted on the basis of
 - (a) separate classification;
 - (b) separate status in the art, or
 - (c) a different field of search.

The Examiner has classified group I and group II in class 004, "Baths, Closets, Sinks, and Spittoons." Respectfully, the Examiner has chosen to improperly classify group I and group II. Group I was classified in subclass 237 and group II was classified in subclass 661. Subclass 661 has a title of "MISCELLANEOUS" with description: "This subclass is intended under the class definition. Subject matter which is not provided for in any of the preceding subclasses."

Respectfully, Applicant contends that the classifications should be the same and that classification into different subclasses is improper because the claims of group II are clearly directed to "supporting a human on a support surface." Respectfully, Applicant contends that the Examiner has overreached by utilizing the "MISCELLANEOUS" subclass (237) to support the restriction.

Respectfully, Applicant contends that the Examiner improperly characterizes a "materially different apparatus" as one "that does not require a seat portion and a back portion." In the instant application, in one or more embodiments, the Applicant teaches *an apparatus* (italics added) that can be configured in various

positions. Two of the many possible positions are shown in the embodiments depicted in **Figure 8A**, and **figure 8B**, which are reproduced below. Respectfully, the "materially different apparatus" (as defined by the Examiner) is one and the same apparatus in one or more embodiments.

Title: SUPPORT APPARATUS FOR A HUMAN AND METHOD OF USE
Inventor: Darrell James Shelton 206-447-1336
Docket No.: M5015.P001
Express Mail No.: ET437832657US
Filing Date: June 23, 2003
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FIGURE **8A**

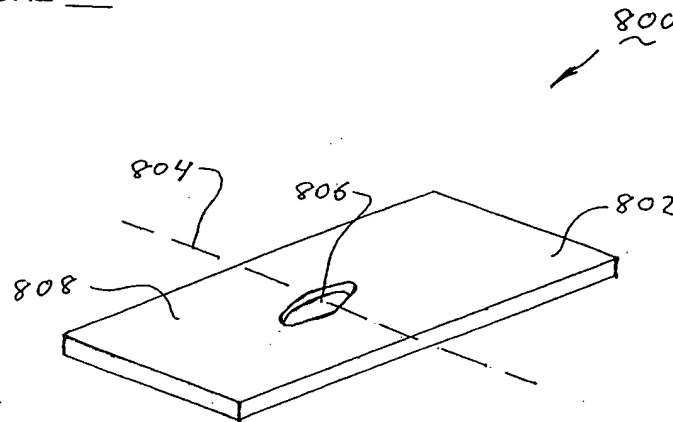
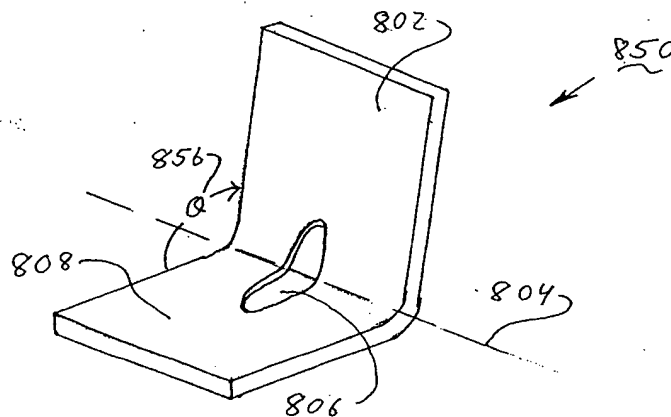


FIGURE 8B



In one embodiment, as shown in **Figure 8A**, and **figure 8B**, the instant applications teaches:

In another embodiment, the present invention can be adapted to a bed. Such a bed can be adjusted from a reclined position to an elevated position. **Figure 8A** illustrates one embodiment of the invention adapted to a bed in a reclined position. With respect to **figure 8A**, a reclined support surface is shown generally at 800.

Application Ser. No. 10/602,495, paragraph [0051].

Thus, Applicant teaches an apparatus that can be "configured in a general manner allowing for general positioning of the first portion 808 and the second portion 802, in much the same way that hospital beds are adjusted." Application Ser. No. 10/602,495, paragraph [0052].

Figure 8A and **figure 8B**, teach, among other things, an embodiment of an apparatus that can be configured into an apparatus that does not require both a seat portion and a back portion as well as an apparatus that does require a seat portion and a back portion. Respectfully, the Examiner's characterization of a "materially different apparatus such as an apparatus that does not require both a seat portion and a back portion," Office Action, 10/1/04, paragraph. 2, page 2, while utilizing the MISCELLANEOUS subclass 661 does not support a restriction.



Respectfully, this materially different apparatus (as defined by the Examiner) is one and the same apparatus in the embodiment described herein; thus, the Examiner's argument is rendered mute.

CONCLUSION

Applicant has provided the election of claims as requested by the Examiner and has traversed the restriction requirement. Applicant respectfully requests reconsideration and removal of the restriction requirement.

Respectfully submitted,

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October 29, 2004
Date

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